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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

LOUISE CRUM SMITH, RALPH CRUM, JAMES CRUM, F. BATES SULLIVAN, C. H. SULLIVAN, JR., LOUISE SULLIVAN JENNINGS, VIRGINIA SULLIVAN McDANIELS, FRANCES RICE, THROUGH HER CO-GUARDIANS, F. BATES SULLIVAN AND VIRGINIA SULLIVAN McDANIELS, AND CHARLOTTE GIBSON,
Petitioners,

vs.

FIRST TENNESSEE BANK N.A. MEMPHIS, EXECUTOR OF THE ESTATE OF LULA S. TORIAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN S. PORTER
BURCH, PORTER & JOHNSON
130 North Court Street
Memphis, Tennessee 38103

ELTON A. RIEVES III
RIEVES, RIEVES & SHELTON
200 Shoppingway
West Memphis, Arkansas 72301
(501) 735-3420

Attorneys for Petitioners

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QUESTIONS PRESENTED

1. May the Complaint of Respondent, The First Tennessee Bank N.A. Memphis, be sustained as a bill in the nature of interpleader under Title 28, §1335, U. S. Code and an injunction be issued on the Complaint where the Complaint and the evidence show that there is neither a fund nor property in the hands of Respondent which is subject to the claims of adverse claimants?

The U. S. District Court for the Western Division, Western District of Tennessee and the U. S. Court of Appeals (6th Circuit) answered in the affirmative.

Petitioners contend the answer should be "No."

2. May the District Court sustain a Complaint in the nature of interpleader and issue an injunction thereon on the basis of inconsistent judgments where the Complaint shows that the judgments were rendered by the Supreme Court of Mississippi and subsequently by the Supreme Court of Arkansas; that the Mississippi judgment was relied on in the Arkansas litigation under the full faith and credit clause and the doctrine of *res judicata,* and that the Arkansas Supreme Court considered and overruled the constitutional defense and the plea of *res judicata,* holding that its judgment was not inconsistent with the Mississippi judgment?

The U. S. District Court for the Western Division, Western District of Tennessee and the U. S. Court of Appeals (6th Circuit) answered in the affirmative.

Petitioners contend the answer should be "No."

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Louise Crum Smith, Ralph Crum, James Crum, F. Bates Sullivan, C. H. Sullivan, Jr., Louise Sullivan Jennings, Virginia Sullivan McDaniels, Frances Rice, through her co-guardians, F. Bates Sullivan and Virginia Sullivan McDaniels, and Mary Charlotte Gibson (herein called Smith, et al.), the Petitioners herein, pray that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case.

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Tennessee, Western Division is unreported and is printed in Appendix "A" hereto, infra, page A-1. The final Order of the United States Court of Appeals for the Sixth Circuit, affirming the District Court, filed December 15, 1980, is printed in Appendix "A" hereto, infra, page A-6.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit affirmed the District Court December 15, 1980. (Appendix "A", infra, page A-6). The jurisdiction of the Court is invoked under 28 U.S.C.S. §1254.

QUESTIONS PRESENTED

1. May the Complaint of Respondent, The First Tennessee Bank N.A. Memphis, be sustained as a bill in the nature of interpleader and an injunction be issued on the Complaint where the Complaint and the evidence show that there is neither a fund nor property in the hands of Respondent which is subject to the claims of adverse claimants?

2. May the District Court sustain a Complaint in the nature of interpleader and issue an injunction thereon on the basis of inconsistent judgments where the Complaint shows that the judgments were rendered by the Supreme Court of Mississippi and subsequently by the Supreme Court of Arkansas; that the Mississippi judgment was relied on in the Arkansas litigation under the full faith and credit clause and the doctrine of *res judicata,* and that the

Arkansas Supreme Court considered and overruled the constitutional defense and the plea of *res judicata*, holding that its judgment was not inconsistent with the Mississippi judgment?

3. Can the District Court in the case at bar enjoin the Probate Judge of the Probate Court in Arkansas, the Chancellor in the Chancery Court of Mississippi having probate jurisdiction, and the parties in the probate matters from the proceeding and administration of an estate where both Courts have jurisdiction of the estates and jurisdiction of an accounting incident to the administration of the estate to the extent of the property within each state?

Basis for jurisdiction of district court.

The basis for jurisdiction of the federal court is the following statute:

> Title 28, §1335, is as follows:
>
> "(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if
>
> (1) Two or more adverse claimants, of diverse citizenship as defined in Section 1332 of this title,

are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if

(2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another." June 25, 1948, c. 646, 62 Stat. 931.

STATEMENT

The Complaint of Respondent, First Tennessee Bank N.A. Executor, was filed as a bill in the nature of interpleader against Smith, et al, and Sullivan, et al.

The basis for the Complaint is alleged to be that the First Tennessee Bank N.A., as Executor of the testatrix in Mississippi, and the First Tennessee Bank N.A., as Executor of the testatrix in Arkansas, is subject to two inconsistent judgments.

The first of the alleged inconsistent judgments was rendered by the Supreme Court of the State of Mississippi styled: *In Re*: *Torian's Estate,* reported in 321 So.2d 287 on an opinion rendered November 5, 1975. The second allegedly inconsistent judgment was by the Arkansas Supreme Court styled: *Smith, et al v. First Tennessee Bank, Executor*, reported in 564 SW2d 521, rendered April 24, 1978. First Tennessee Bank sought a reversal of the Judgment of the Arkansas Supreme Court by a Petition for Writ of Certiorari which was denied by this Court on the 2nd day of October, 1978.

The testatrix, Lula S. Torian, was legally domiciled in West Memphis, Arkansas at the time of her death, but owned approximately 920 acres of land in Desoto County, Mississippi (Paragraph 7 of Complaint).

Under the terms of Mrs. Torian's Will, which was probated in both the States of Mississippi and Arkansas by the Bank, the Mississippi real estate was devised to Sullivan, et al and substantially all of the personal property of the value of approximately one-half million dollars, and having its legal situs in Arkansas was bequeathed to the Petitioners, Smith, et al.

Final accounting by the Bank as executor, in the Arkansas estate, reflected that payment of all the death taxes due in connection with the entire estate, both in Arkansas and in Mississippi, was made out of the Arkansas estate (Paragraph 13 of Complaint). When Respondent filed its accounting in the Probate Court of Crittenden County, Arkansas objection was made by Smith, et al that the death taxes with respect to the Mississippi land was allocable to the recipients of the same and this objection to the accounting was sustained by the Arkansas Probate Court, which disallowed a credit to Respondent in the amount of $228,-543.22 (Complaint, Paragraph 14). This charge made against Respondent, as Executor in the Arkansas Probate proceedings, has been fully paid. An appeal from the order of the Probate Court of Arkansas was taken by Respondent to the Arkansas Supreme Court, which affirmed the action of the Probate Court. Respondent then petitioned for a Writ of Certiorari to this Court, which was denied. Respondent then filed a Complaint in the United States District Court for the Western District of Tennessee, Western Division, which was filed as a bill in the nature of interpleader against Smith, et al and Sullivan, et al.

Proceedings In District Court

In the District Court, prior to the hearing on the Motion of Plaintiff therein for a preliminary injunction, Petitioners, Smith, et al, filed a Motion to Quash the summons issued against them and to dismiss the Complaint.

Ground one of the Motion alleged that no deposit of the alleged estate was made with the Clerk and no bond was filed, and therefore, process was issued without juris-

diction of the Court as provided by Title 28, §1335 United States Code.

Ground three of the Motion alleged that the Complaint showed on its face that there was neither a fund nor property in possession of the Plaintiff which is claimed by adverse interests.

Ground four of the Motion alleged that the controversy and issues alleged to exist between the movants and Plaintiff have been finally adjudicated and settled by the final decree of the Probate Court of Crittenden County, Arkansas, the opinion of the Supreme Court of Arkansas, which affirmed the Trial Court, and by the denial of a Writ of Certiorari by this Court.

Ground five of the Motion alleged that the liability of Plaintiff to Smith, et al had been merged in the final decree entered in the Probate Court of Arkansas, affirmed by the Supreme Court of Arkansas and certiorari denied by the Supreme Court of the United States, and the liability of Plaintiff to Smith, et al, cannot be the subject of a bill in the nature of an interpleader because such a Complaint would constitute a collateral attack upon a valid final decree of a court of competent jurisdiction.

Ground six of the Motion was that the final decree entered in the Probate Court of Crittenden County was entered pursuant to an accounting of the administration of the estate of Lula S. Torian and the Probate Court had exclusive jurisdiction in such a proceeding.

The last ground of the Motion was that the Complaint showed on its face that there were not multiple claims to a common fund in the hands of the Plaintiff and, therefore, there was no basis for a bill in the nature of an interpleader.

At the conclusion of the hearing on application for a preliminary injunction, the District Judge rendered an oral opinion:

> "This Court concludes that the two groups of defendants have adverse claims to the assets of the Estate of Lula S. Torian, as that term is used in the interpleader statute, as evidenced by conflicting state court judgments of Arkansas and Mississippi as to whether the interests of Mississippi defendants Sullivan should be charged with payment of a pro rata part of federal estate and inheritance taxes that have been paid out of the residuary estate by the executor.
>
> "The Court further concludes that the two defendant-claimant groups are of sufficiently diverse citizenship to satisfy the requirements of 28 U.S.C. §1335.
>
> "The Court therefore concludes that this is a proper case for a bill in the nature of a bill of interpleader under §1335 of Title 28, U. S. Code, the plaintiff having filed a bond in the amount of $260,000.00 in this cause with plaintiff as principal and the holding company which owns plaintiff as surety.
>
> "The Court further concludes that the defendants Sullivan and the defendants Smith should be enjoined from instituting or prosecuting any suit, including probate proceedings regarding the Estate of Lula S. Torian, in any state or United States Court except this Court and in this proceeding; and that the defendants the Hon. Henry Wilson

> and the Hon. Leon Hannaford should be enjoined from entering any further Orders in the Estate of Lula S. Torian, deceased.
>
> "The Court at the hearing was only concerned with that portion of the motions filed by defendants which raise jurisdictional questions, and the Court is of the opinion that the other grounds of the motions filed should not be ruled upon at this time."

Thereafter an order granting the preliminary injunction was issued in which the Court ruled:

> "The Court made oral findings and conclusions at the end of the hearing. For the reasons included in the oral ruling the Court concluded that the present action is properly brought under the federal interpleader statute, 28 U.S.C. §1335, and a Preliminary Injunction should issue and that the motions of the defendants which challenge the jurisdiction of this Court under the interpleader statute should be denied."

The Court's order enjoined petitioners, Smith, et al, and Sullivan, et al, from instituting or prosecuting any suit, including probate proceedings in any state court or United States court except "in this Court".

The Court enjoined Henry Wilson, Probate Judge of Crittenden County, Arkansas, and Leon Hannaford, Chancellor of the Chancery Court of Desoto County, Mississippi, from proceeding to close the estate or taking any steps which affect the Estate of Lula S. Torian or its assets. The Motions of the defendants, Smith, et al, were overruled and denied to the extent that they challenged the jurisdic-

tion of the United States District Court under the interpleader statute.

After the motions challenging the sufficiency of the Complaint were filed by these petitioners, First Tennessee Bank, N.A. filed a bond to the effect that it binds plaintiff to comply with the future orders and judgments of the Court.

An appeal was taken by Smith et al to the United States Court of Appeals for the Sixth Circuit, which affirmed the judgment of the District Court.

ARGUMENT

THE COMPLAINT OF FIRST TENNESSEE BANK LACKS THE ESSENTIALS OF A BILL OF INTERPLEADER AND CANNOT BE SUSTAINED AS A BILL OF INTERPLEADER.

Plaintiff has no stake in its hands which is subject to adverse claims, no claims are pending against plaintiff of any kind, whether related to a stake or not, and the complaint does not pray for a resolution of adverse claims against any funds or property held by plaintiff. We invite the attention of the Court to the prayer of the complaint which is revealing of its true nature.

Paragraph 2 of the prayer is as follows:

> "2. The Court enter an order requiring the beneficiaries under the Will of Lula S. Torian, all of whom are Defendants herein, to interplead in this action regarding their rights, represented and affected by the two inconsistent State Court judgments."

The testimony of Mr. Blumenthal, the Trust Officer, shows that the plaintiff's liability to the defendants, Smith, et al, under the Arkansas judgment has been fully paid and satisfied, and that there are no claims outstanding against the bank by these defendants in connection with this administration.

Prayer of the complaint is as follows:

> "3. Plaintiff be relieved from any and all further liability to Defendant beneficiaries upon the determination of which of the conflicting State Court judgments should be controlling upon it and

> the parties hereto and further be awarded such judgments as may be appropriate under the determination made by this Court."

This prayer seeks affirmative relief for the plaintiff and has nothing whatever to do with an interpleader.

In *Federal Practice and Procedure,* Wright and Miller, Volume 7, §1702, the purpose of modern interpleader is succinctly stated as:

> §1702. *Nature and Purpose of Interpleader.*
>
> "* * *. Modern interpleader reflects the same liberal attitude toward joinder as does Rule 20 in that it allows a stakeholder who is uncertain if and to whom he is liable for money or property held by him to join those who are or might assert claims against him. * * *" (p. 361).

In *General Atomic Co. v. Duke Power Co.,* 553 F.2d 53 (10th Cir. 1977), the Court said:

> "One condition which appears unavoidable is the presence in the interpleader action of a stakeholder and the deposit in court of the money or property demanded by the claimants. If the stakeholder is disinterested, he is entitled to dismissal. An ancillary aspect is that suits in other states can be enjoined.
>
> [4, 5] Our conclusion from an overview of the statute and from a reading of the cases, is that the structure of this action considered as a whole is such that it fails completely to qualify as an interpleader procedure. The property is not in the hands of the plaintiff and thus it cannot be de-

posited in court and cannot be placed by plaintiff in the custody of the court. The essential aspect is that the rest be under the control of the person bringing the lawsuit, so as to be deliverable to the registry of the court. The action is an in rem or quasi in rem suit in its nature. The court holds the property and the claimants compete in an effort to have it awarded. In the case at bar the property is not available for delivery to the court. There being no tangible or intangible property subject to the demands of the claimants, the main purpose of the interpleader action cannot be brought about. The property is thus unavailable for competitive claims." (pp. 56 & 57).

The Court stated further:

"[6, 7] The lesson which the *Tashire* case teaches is that in the present context interpleader is a limited remedy; it is not in the nature of a bill of peace as is repeatedly stated in the opinion. The mission of this statute is to administer a limited amount of property and conflicting claims of several litigants to that property." (p. 57).

In *Edner v. Massachusetts Life Insurance Co.*, 138 F.2d 327 (3rd Circuit), the Court stated with reference to the requirement of a deposit of the stake of property subject to adverse claims or the giving of a bond in lieu thereof, the following:

"The making of the deposit or giving of a bond is thus made a condition precedent to the acquisition by the court of jurisdiction to direct the extra territorial service of process upon a nonresident

> defendant and to take further steps in the cause. Since in the present case a deposit was inappropriate and a bond was not filed the court was without jurisdiction to grant the preliminary injunction appealed from." (p. 330).

In *Gaines v. Sunray Oil Company*, 539 F.2d 1136 (8th Cir. 1976), the Court said:

> "[4] Interpleader is a procedural device whereby a party holding money or property concededly belonging to another may join in a single suit two or more parties asserting mutually exclusive claims to the fund. The stakeholder is thereby freed from the threat of multiple liability and/or the vexation of multiple lawsuits. See 3A *Moore's Federal Practice* ¶22.02[1] (1974).
>
> [5] Requisite to the maintenance of an interpleader action is that the stakeholder be subject to multiple adverse claims against a single fund or liability." (Citing numerous authorities) (p. 1141).

The Absence of Essential Jurisdictional Facts Under Title 28, §1335.

As shown above, the prayer of the Complaint does not seek the judgment of the Court as to the claims of adverse claimants to any stake or fund, but, on the contrary, prays for a judgment in its behalf to recover the funds previously expended by Plaintiff.

At the conclusion of the argument upon the Motion to Dismiss in the District Court, Judge McRae ruled in favor of jurisdiction stating in the "Ruling of the Court" (A-6) as follows:

> "Now I am not directing that this be done, but if the Court is wrong, and I am very much concerned about whether we waited too late with the bond and all the other things, this preliminary injunction or the issuance of it can be appealed at this time. Now, counsel might want to give some consideration to that because if the Court is in error about whether or not we should have the interpleader we ought to learn about it before you all start digging into all these things about who was in Mississippi and who didn't go to Arkansas, and that is a real law school exam situation.
>
> I don't believe that the last judgment in time is that simple in this case. It may be. But the more I hear our good friends from Mississippi talk the more persuasive they are, and when the Arkansas lawyers are on their feet they are persuasive.
>
> The thing that has persuaded me to go this route is that I have become persuaded that some court has to be available to resolve this matter."

In the "Findings of Fact and Conclusions of Law" the Court made two findings which clearly show the absence of a stake. The District Court found:

> "Thereupon the plaintiff with its own funds made the distribution of the disallowed credit, which exceeded the funds on hand in the estate."

The Court found further:

> "This Court concludes that the two groups of defendants have adverse claims to the assets of the Estate of Lula S. Torian, as that term is used

in the interpleader statute, as evidenced by conflicting state court judgments of Arkansas and Mississippi as to whether the interests of Mississippi defendants Sullivan should be charged with payment of a pro rata part of federal estate and inheritance taxes that have been paid out of the residuary estate by the executor.

The Court further concludes that the two defendant-claimant groups are of sufficiently diverse citizenship to satisfy the requirements of 28 U.S.C. §1335.

The Court therefore concludes that this is a proper case for a bill in the nature of a bill of interpleader under §1335 of Title 28, U. S. Code, the plaintiff having filed a bond in the amount of $260,000.00 in this cause with plaintiff as principal and the holding company which owns plaintiff as surety.

The Court further concludes that the defendants Sullivan and the defendants Smith should be enjoined from instituting or prosecuting any suit, including probate proceedings regarding the Estate of Lula S. Torian, in any state or United States Court except this Court and in this proceeding; and that the defendants the Hon. Henry Wilson and the Hon. Leon Hannaford should be enjoined from entering any further Orders in the Estate of Lula S. Torian, deceased.

The court at the hearing was only concerned with that portion of the motions filed by defendants which raise jurisdictional questions, and the

> Court is of the opinion that the other grounds of the motions filed should not be ruled upon at this time."

The foregoing clearly shows that there was a negative balance in the estate and not any fund or property as to which there were adverse claims, and although the Court finds that there were adverse claims to the assets of the estate, he does not find that there were adverse claims to assets *in the hands* of plaintiff.

Confirming the great doubts that the Trial Court had of the Court's jurisdiction, the Court incorporated the following in numerical paragraph 4 of the "Order Granting Preliminary Injunction and Denying Motion to Dismiss."

> 4. Although this Court is of the opinion that this Order Granting Preliminary Injunction is appealable pursuant to 28 U.S.C. §1292(a)(1), if the Court is in error, the Court is of the opinion that this Order involves a controlling question of law as to which there is a substantial ground for difference of opinion, namely the jurisdiction of this Court to proceed under the interpleader statute in the light of the facts and circumstances of this case. The Court is of the further opinion that an immediate appeal from the Order may materially advance the ultimate termination of the litigation.

The Court of Appeals confirmed the finding of the Trial Court that the funds of the estate have been completely depleted on page 2 of the Order affirming the Trial Court where it is stated:

> "Conflicting rulings by the courts of Arkansas and Mississippi have resulted in the executor's being required to pay a portion of the federal estate tax applicable to the Mississippi real estate from its own funds rather than from the decedent's estate."

The foregoing shows affirmatively that neither the Trial Court nor the Court of Appeals has found that there is any stake or fund in the hands of the plaintiff and also shows that no claims are now being advanced against plaintiff by either sets of defendants.

The real basis for the Court's ruling of jurisdiction in favor of the Bank appears clearly in the "Ruling of the Court" where Judge McRae stated, "The thing that has persuaded me to go this route is that I have become persuaded that some Court has to be available to resolve this matter."

In summary, plaintiff has failed to meet the threshold jurisdictional requirements of showing that there were adverse claimants to a fund or property which is the subject of this suit, and secondarily that plaintiff has deposited the fund or property into the Registry of the Court, or has filed a bond in lieu thereof.

Plaintiff cannot comply with these jurisdictional requirements of Title 28, §1335 because there simply is not in the hands of the plaintiff, a fund or property in dispute, there are no adverse claimants to any fund or property, and the plaintiff has failed to deposit a fund or property into the registry of the Court or file a bond in lieu of fund or property because there is no stake as to which adverse claims have been made.

The real purpose of this suit is to recover from the defendants, the death taxes paid by the plaintiff on the Mississippi real estate. A somewhat similar attempt was made by the plaintiff in *Gaines v. Sunray Oil Company*, supra, where the Court quoted with approval from *Great American Insurance Company v. The Bank of Bellevue*, 366 F.2d 289 (8th Cir. 1966), at 294 as follows:

> "Interpleader, being a remedy solely for the protection of the stakeholder, it may not be used by the stakeholder as a weapon to defeat recovery from funds other than the one before the court." (9.294).

THE COMPLAINT OF FIRST TENNESSEE BANK SHOWS ON ITS FACE THAT THE CONTROVERSY BETWEEN PLAINTIFF AND DEFENDANTS, SMITH, ET AL, HAS BEEN FINALLY SETTLED BY THE JUDGMENT OF THE SUPREME COURT OF ARKANSAS.

Plaintiff alleges that it is perplexed because there are two valid but inconsistent judgments existing in this matter, one being the judgment of the Supreme Court of Mississippi and the other being the judgment of the Supreme Court of Arkansas. In the Arkansas case, plaintiff relied upon the judgment of the Mississippi Court, and the Arkansas Court gave it the faith and credit to which it was entitled under the Constitution and the effect and credit to which it was entitled under the doctrine of *res judicata*. The Arkansas judgment settled that issue.

In *Porter v. Wilson*, 419 F.2d 254, a similar issue arose. There was a judgment in Idaho in favor of William A. Porter. Thereafter a suit was instituted in Arizona, and

the Idaho judgment was plead and relied upon as *res judicata*. The Arizona Court considered this issue and held that it was not bound by the Idaho judgment. The Supreme Court of the United States denied certiorari. Thereafter. William A. Porter, the party against whom the Arizona Supreme Court had ruled adversely, filed an action in the United States District Court, and alleged that the Arizona Court had failed to give full faith and credit to the Idaho judgment. In this situation, the Court of Appeals for the Ninth Circuit held:

> "[1] We have concluded that the federal district court properly held that it was bound by the Arizona Supreme Court's decision.
>
> "This is not because the Arizona Supreme Court's ruling was correct, but rather because the full faith and credit requirement and the *Erie* doctrine compel acceptance of the Arizona judgment even if the Arizona court erred in refusing to give full faith and credit to the prior Idaho judgment." (p. 257).
>
> "[3] Defendants' basic error, it seems to us, lies in the mistaken assumption that it was the role of the federal district court to review and revise the decision of the Supreme Court of Arizona on the issue presented to that court under the full faith and credit clause. The sole function of the federal court, however, was to give the Arizona judgment 'the same full faith and credit * * * as [it] ha[d] by law or usage in the [Arizona] courts * * *.' 28 U.S.C. §1738 (1964). Plaintiff's remedy for an erroneous denial of full faith and credit to the Idaho judgment by the Arizona Supreme

Court was for review in the Supreme Court of the United States, not collateral attack in the federal district court. This is the holding of *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 74-78, 60 S.Ct. 44, 84 L.Ed. 85 (1939). See also *Morris v. Jones*, 329 U.S. 545, 552, 67 S.Ct. 451, 91 L.Ed. 488 (1947); *Southard v. Southard*, 305 F.2d 730, 732 (2d Cir. 1962).

"This would be true even if contradictory judgments were involved, for '[i]t is the latest final adjudication of the issue which controls, even though the latest is one which could itself have been reversed for violation of the full faith and credit clause had timely appeal been taken.' Leflar, *American Conflicts Law*, 187 (1968 ed.); see also *Restatement (Second) of Conflicts* §114, comments a & b, 407-09 (1967); *Restatement Of Judgments* §42 (1942); 15 Stan. L. Rev. 331, 335-36 (1963).

"Here the case is clear, for the Arizona judgment was the first and only adjudication of the issue of whether the Idaho judgment was entitled to full faith and credit. Right or wrong, it should be the last. 9 *Ariz. L. Rev.* 88, 89-90. See, *Roche v. McDonald*, 275 U.S. 449, 454-455, 48 S.Ct. 142, 72 L.Ed. 365 (1928)." (pp. 258, 259).

The Ninth Circuit cited *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 84 L.Ed. 85. In *Treinies*, there was a bill of interpleader filed in connection with the ownership of certain stock in *Sunshine Mining Co.* The facts were the Court of the State of Washington held that Evelyn H. Treinies was entitled to the stock. Thereafter, in litigation in Idaho, the Idaho Court held that a Mrs. Mason was

entitled to the stock. The Idaho Court considered a plea of *res judicata* filed by Mrs. Treinies, but refused to give full faith and credit to the decree upon which she relied. In this situation, the *Sunshine Mining Co.* filed an interpleader complaint naming Mrs. Treinies and Mrs. Mason as a defendant, and the District Court was required to resolve the issue of the two conflicting judgments. The Court concluded that the last judgment rendered, which was the judgment of the Idaho Court in which the Washington judgment had been plead as *res judicata,* was controlling. In considering this issue, the Court said:

> "The Court of Appeals correctly determined that the issue of jurisdiction vel non of the Washington court could not be relitigated in this interpleader. As the Idaho District Court was a court of general jurisdiction, its conclusions are unassailable collaterally except for fraud or lack of jurisdiction. The holding by the Idaho court of no jurisdiction in Washington necessarily determined the question raised here as to the Idaho jurisdiction against Mrs. Treinies' contention. She is bound by that judgment.
>
> "The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question. Even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court.
>
> "One trial of an issue is enough. 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues, as well to jurisdiction of the subject matter as of the parties.'

"Decree affirmed." (84 L.Ed 93).

The Bank does not claim that there is any defect in the Arkansas judgment such as fraud, lack of jurisdiction or other deficiency that would subject the judgment to a collateral attack. On the contrary, in numerical paragraph 19 of the complaint, the Bank states that it "Is faced with conflicting judgments of the highest Courts of the States of Arkansas and Mississippi."

There have been a number of cases where allegedly conflicting judgments were rendered. Invariably the Courts have held that the last judgment rendered in the situation at bar controls.

In *Porter v. Wilson,* 419 F.2d 254, cited supra:

> "[i]t is the latest final adjudication of the issue which controls, even though the latest is one which could itself have been reversed for violation of the full faith and credit clause had timely appeal been taken. Leflar, *American Conflicts Law,* 187 (1968 ed.)." (p. 259).

This same conclusion is stated in *Treinies v. Sunshine Mining Co.,* supra, from which we quoted earlier in this brief.

In Volume 1B, *Moore's Federal Practice,* ¶0.405 [4.-1], it is stated:

> "A final valid judgment, even though erroneous, is not subject to collateral attack. And normally no matter how erroneous it may be on either the facts or the law it has binding *res judicata* and collateral estoppel effect, until prop-

erly set aside, in all of the nation's tribunals, Federal and State, on the parties and their privies."

A UNITED STATES DISTRICT JUDGE SHOULD NOT INTERFERE BY INJUNCTION WITH STATE JUDGES EXERCISING THEIR LAWFUL JURISDICTION, PARTICULARLY IN MATTERS OF PROBATE OF A DECEDENT'S ESTATE.

Liability of plaintiff to movants arose out of an accounting in the Probate Court of Crittenden County, Arkansas. The plaintiff sought credit for a large sum of money (approximately $229,000.00) paid out of the Arkansas probate estate for the benefit of Mississippi residents in discharge of their liability for estate taxes on Mississippi land. Movants excepted to this accounting and their exceptions were sustained by the Probate Judge. An appeal was perfected to the Supreme Court of Arkansas and the ruling of the Trial Court was affirmed. The United States Supreme Court denied certiorari.

Jurisdiction of this matter is granted to the Probate Courts of Arkansas by Article 7, §34, of the Arkansas Constitution which was amended by Amendment 24 to the Arkansas Constitution. No question has been raised as to the jurisdiction of the Arkansas Probate Court.

§62-2004(b) of the Arkansas Code provides that the same presumptions shall exist as to the validity of the orders and judgments of the Probate Court as exists to the orders and judgments of Courts of general jurisdiction.

In *Starr v. Rupp*, 421 F.2d 999, the beneficiary of an estate filed exceptions to an accounting in the Probate Court of Ohio. These exceptions were acted upon by the

Probate Judge. Thereafter the objecting beneficiary filed a suit in the Federal Court seeking to be relieved of the judgment made by the Probate Court adverse to him. The Sixth Circuit, speaking through an opinion of Judge Weick stated:

> "[6] The Probate Court has exclusive jurisdiction of an action the subject matter of which relates to the conduct of the defendant as executor and the settlement of his accounts. 23 Ohio Jur. 2d, Ex. & Adm. Sec. 623. See *Neidecker v. Neidecker*, 63 Ohio App. 416, 26 NE2d 929 (1939).
>
> "[7, 8] The Probate Court will disapprove any account if it appears there is any violation of the law or irregularity, will disallow any items which are improper, will surcharge the account for sums for which the fiduciary should be liable but with which he has not charged himself, will order an account corrected, and will fix the liability of the fiduciary for any failure to account fully for the estate. 24 Ohio Jur. 2d, Fiduciaries, Section 294, and cases cited therein." (p. 1006).

The Court concluded that the United States District Court in which the action was filed had no jurisdiction because jurisdiction in this type matter was exclusive in the Probate Court of Ohio.

In Judge Weick's opinion, *Princess Lida v. Thompson*, 83 L.Ed. 291, 305 U.S. 454, was cited as authority for the ruling, and the same principles were announced by the Supreme Court in *Princess Lida*.

In *Yonley v. Lavender*, 88 U.S. 276, 22 L.Ed. 536, 537 (1874), the Supreme Court held:

> "The several States of the Union necessarily have full control over the estates of deceased persons within their respective limits. In Arkansas, the probate of wills, and the grant of letters testamentary or of administration, is to place the whole estate, real and personal, within the custody of the law, and leave it there until the administration has been completed." *Yonley v. Lavender,* 88 U.S. 276, 22 L.Ed. 536, 537 (1874).

In 42 Am. Jur. 2d, Injunction, §201, it is said:

> "An injunction decree or order restraining actions or proceedings in another court is directed only to the parties. It is not addressed to the court and is in no sense a prohibition on it in the exercise of its jurisdiction. There is no denial of the jurisdiction of the other court in which the proceedings are pending, nor any assumption of superiority over that court."

We are not aware of any lawful basis for the issuance of the temporary injunction in this case. It did not protect the jurisdiction of the District Court in connection with any funds, stake or property in dispute and did not prohibit any prospective interference with the right of the District Court to perform any lawful judicial duty which could have arisen out of this litigation.

The ineptness of the plaintiff Bank in undertaking a domiciliary administration of the estate of testatrix in Mississippi brought about this entire series of litigations, and by this pending suit the Bank seeks to further extend and increase the burden of litigation on our clients, Smith, et al, under the sleeveless claim that they are continuing

to make claims against the Bank in connection with the entire estate, when, in truth and in fact, the Arkansas judgment fully satisfied their claim insofar as this administration is concerned.

THE COURT OF APPEALS ERRED IN AFFIRMING THE JUDGMENT OF THE DISTRICT COURT FOR THE ASSIGNED REASON "THE FINDINGS OF THE DISTRICT COURT ARE NOT CLEARLY ERRONEOUS."

Where the question of jurisdiction is involved, the law does not place upon the parties the burden of showing that the acts of the District Court were clearly erroneous. On the contrary, the burden is upon the parties seeking to invoke the Court's jurisdiction to show clearly in the Court of Appeals as well as in the Trial Court, that the Court has jurisdiction.

The record clearly discloses there is no fund or property in the hands of the respondents which is subject to the claims of adverse claimants. U.S.C. Title 28 §1335 grants jurisdiction only where there are adverse claimants to either a fund or property in the hands of the plaintiff seeking to invoke jurisdiction.

APPLICABLE AUTHORITIES

Party seeking exercise of jurisdiction of Federal District Court in his favor must allege facts essential to show jurisdiction and must carry throughout litigation burden of showing that he is properly in court. *McNutt v. General Motors Acceptance Corporation of Indiana,* Ind. 1936, 56 S.Ct. 780, 398 U.S. 178, 80 L.Ed. 1135. See also, *Birmingham Post Co. v. Brown,* C.A. Ala. 1954, 217 F.2d 127; *Becker v.*

Angle, C.C.A. Okl. 1974, 165 F.2d 140; *Royalty Service Corporation v. City of Los Angeles,* C.C.A. Cal. 1938, 98 F.2d 551.

The quotations from the record set forth above clearly show that Judge McRae had grave doubts as to the Court's jurisdiction and, in fact, invited the appeal because of his doubts. In a situation where those doubts exist, the plaintiff invoking the jurisdiction of the Court has failed to carry the burden that the law places on him and the authorities are consistent in holding that where the Court is doubtful of its jurisdiction, it must deny jurisdiction and dismiss the bill. *New York Life Insurance Company v. Greenfield,* 154 F.2d 953 (Fla. 1946); *Freeney v. First National Bank,* 16 F. 433; *United States v. Mississippi,* 229 F. Supp. 925.

It will be presumed that a cause is without the jurisdiction of a Federal District Court unless the contrary affirmatively appears from the record. *In re Smith,* Tenn. 1877, 94 U.S. 455, 4 Otto 455, 24 L.Ed. 165. See, also, *Grace v. American Cent. Ins. Co.,* N.Y. 1883, 3 S.Ct. 207, 109 U.S. 278, 27 L.Ed. 932; *Baltimore & O. R. Co. v. Thompson,* D.C. Mo. 1948, 8 F.R.D. 96.

The opinion of the Court of Appeals is contrary to the presumption denying jurisdiction in that the Court imposed upon these defendants (petitioners) the burden of showing that the judgment of the Trial Court as to jurisdiction was clearly erroneous.

In *Gaines v. Sunray Oil Company,* 539 F.2d 1136, the Court makes a very clear statement concerning jurisdiction in interpleader actions as follows:

> [4] Interpleader is a procedural device whereby a party holding money or property con-

plea of *res judicata* filed upon the basis of the Mississippi judgment and overruled the plea upon a sound legal basis. The Court concluded:

> . . . The Mississippi judgment was entitled to a full faith and credit in Arkansas as far as it concerned property in Mississippi, but it had no effect *in rem* upon the property legally situated in Arkansas.
>
> Accordingly, it was not entitled to full faith and credit nor *res judicata* effect on the issue of allocation of tax liability in regard to the assets of the Arkansas estate.
>
> Appellant contends the court erred in applying the Arkansas estate tax apportionment statute to Mississippi real estate because it was without jurisdiction to do so. Suffice it to say that the Arkansas Probate Court recognized that it had "no control or interest in the Mississippi proceedings." It merely denied the executor the credits sought for the payment of the entire estate tax liabilities out of the Arkansas estate.

This judgment removed any inconsistencies that existed between the Mississippi judgment and the Arkansas judgment contrary to the allegations in the Complaint in this case.

It also settled and disposed of all claims which the Arkansas legatees had against the Bank as executor and thereby eliminated the jurisdictional requirement of Title 28 §1335 of adverse claimants.

Our clients have paid all of their estate taxes by having the amount thereof deducted from their legacies. The

> cededly belonging to another may join in a single unit two or more parties asserting mutually exclusive claims to the fund. The stakeholder is thereby freed from the threat of multiple liability and/or the vexation of multiple lawsuits. See 3A Moore's Federal Practice ¶22.02[1] (1974).
>
> [5] Requisite to the maintenance of an interpleader action is that the stakeholder be subject to multiple adverse claims against a single fund or liability. (Citing numerous authorities).

Judge McRae frankly stated that he was sustaining this suit as an interpleader because he thought the Bank had a meritorious claim against the devisees of the Mississippi land. We agree with this conclusion, but disagree to the extent that it grants the Court any right to assume jurisdiction. In *Peterson v. Sears,* 238 F. Supp. 12, it is stated:

> The jurisdiction of the federal courts is dependent upon the subject matter of the action or the status of the parties. It is not dependent upon the merits of the case. *Geneva Furniture Mfg. Co. v. S. Karpen & Bros.,* 238 U.S. 254, 35 Federal Practice and Procedure §21, n. 3, 4.

THE ARKANSAS JUDGMENT

The Trial Court did not consider the effect of the Arkansas judgment. This judgment absolutely settled all controversies concerning the estate which existed between the bank as executor and the Arkansas legatees designated in this record as Louise Crum Smith, et al. This judgment is incorporated in the Complaint as Exhibit "D". The record shows that this judgment has been fully paid by the Bank from its own funds. The Arkansas judgment considered the

defendants Sullivan, et al, have not paid their estate taxes but these have been paid by the Bank from its own funds.

The real purpose of this suit by the Bank is to recover from the defendants Sullivan, et al, the amount of these taxes paid by the Bank in their behalf.

The jurisdictional question is not affected by the issuance of the injunction. In *Sires v. State of Washington*, 314 F.2d 883, the Court stated:

> . . . Where a district court has jurisdiction of a cause it may, under some circumstances, grant an injunction, preliminary injunction or temporary restraining order. But where there is no underlying cause of action over which the district court has primary jurisdiction, it may not entertain an application for an injunction . . .

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOHN S. PORTER
BURCH, PORTER & JOHNSON
130 North Court Street
Memphis, Tennessee 38103

AND

ELTON A. RIEVES III
RIEVES, RIEVES & SHELTON
200 Shoppingway
West Memphis, Arkansas 72301
(501) 735-3420
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, John S. Porter, certify that a copy of the foregoing Petition for Writ of Certiorari on behalf of Louise Crum Smith, Ralph Crum, James Crum, F. Bates Sullivan, C. H. Sullivan, Jr., Louise Sullivan Jennings, Virginia Sullivan McDaniels, Frances Sullivan Rice and Mary Charlotte Gibson, Petitioners, (sometimes herein referred to as defendants, Smith, et al), was mailed to Mr. Ben C. Adams and Mr. John C. Speer, attorneys for Respondent, 2020 First Tennessee Building, Memphis, Tennessee 38103, and Mr. Jack F. Dunbar and Mr. David T. Lail, attorneys for petitioners, Dorothy Hope Sullivan, Robert Lamb Sullivan, David Sullivan and Warren Sullivan, (herein referred to as defendants, Sullivan, et al), Post Office Box 368, Clarksdale, Mississippi 38614, this 3rd day of March, 1981.

/s/ John S. Porter